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No. 92-98

In The

Supreme Court of the United States

October Term, 1992

KAREN L. KOURI,

Petitioner,

v.

LIBERIAN SERVICES, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should decline the Petition for Certiorari because there is no conflict between the Circuits on what constitutes *quid pro quo* sexual harassment?

2. Whether the Court of Appeals for the Fourth Circuit correctly affirmed the District Court's ruling that Petitioner had failed to prove *quid pro quo* sexual harassment?

3. Whether the Court of Appeals for the Fourth Circuit correctly affirmed the District Court's rulings that there was no basis for imposing liability on Respondent, Liberian Services, Inc.?

4. Whether Petitioner has a cause of action for retaliation?

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STATEMENT OF THE CASE

On April 25, 1990 Kouri filed a complaint it the United States District Court for the Eastern District of Virginia against James N. Todd (hereinafter "Todd") Liberian Services, Inc. (hereinafter "Liberian Services"),[1] and Administrative Control Services, Inc. alleging that Todd sexually harassed her in violation of Title VII and the

[1] IB Holdings, Inc., is the immediate parent company of Liberian Services, with USLICO Corporation being the ultimate parent company. For a listing of all affiliates and subsidiaries, please see the schedule of ownership provided in the appendix.

Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* (1988). Kouri also alleged three common law state claims, intentional infliction of emotional distress, assault and battery, Counts II, III & IV respectively (JAP 365-81).[2]

Kouri's Count I claim of sexual harassment against Liberian Services was tried in the United States District Court for the Eastern District of Virginia on November 15, & 16, 1990 before the Honorable James C. Cacheris. The trial court issued a memorandum opinion finding that the Plaintiff failed to prove that she was discriminated against on the basis of her sex; failed to demonstrate that she put Liberian Services on any notice of her complaints; and that there was no basis on which to impose liability on Liberian Services. Judgment was entered in favor of Liberian Services on February 6, 1991. Kouri appealed the District Court's judgment in favor of Liberian Services and the earlier dismissal of Counts II, III & IV in favor of Todd and Liberian Services to the Fourth Circuit Court of Appeals.

The Court of Appeals for the Fourth Circuit, in an unpublished per curiam opinion dated April 13, 1992, affirmed the District Court's decision.

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[2] The court dismissed, by agreement, the claims against Administrative Control Services on July 20, 1990. Also by agreement on September 5, 1990 the court dismissed Kouri's Count I sexual harassment claim against Todd, but specifically reserved her right to appeal the court's early dismissal of the common law state claims against Todd. Kouri appealed the dismissal of the common law counts which appeal was denied as premature on September 27, 1990.

STATEMENT OF FACTS

In November of 1988, Karen Kouri was employed by Liberian Services as secretary to James Todd. Before her employment with Liberian Services, Kouri and her third husband, John, lived in Texas. She had two sons from a previous marriage, both of whom resided in Texas. One of her sons was homosexual and the other was involved in illegal drugs and went through drug rehabilitation. (JAP 196; 353-354).

Over the years Kouri had sought medical treatment and on occasion been hospitalized for complaints of nightmares, feelings of terror, breaking out in cold sweats, severe migraine attacks, abdominal cramps, back pain, head injury, dizziness, vertigo, anxiety and stress as well as several miscarriages, many of which were associated with family or personal problems. (JAP 198-203; 611-48). She suffered from physically debilitating migraine attacks at least several times a year lasting 26 to 42 hours at a time. (JAP 198-203; 275-76). She was regularly prescribed, valium, zanax, demerol, inderol for the migraine attacks and occasionally compazine. In 1985 Kouri's doctor asked her to undergo a psychiatric evaluation, which she refused. (JAP 611-48; 200-02). Kouri's illnesses and periodic migraine attacks continued throughout her employment with Liberian Services.

James Todd was divorced and had a son who was involved with drugs and undergoing rehabilitation. (JAP 354). Shortly after Kouri's employment, Todd and Kouri began discussing their mutual problems with their children. Kouri discussed with Todd her son's drug rehabilitation and helped Todd through this difficult period.

(JAP 353-355). Kouri offered Todd a great deal of personal and emotional support. (JAP 335-55). She told Todd about her work history, her several miscarriages, the fact that she did not want additional children, but her husband did, about her one son's homosexuality, and the other son's drug dependency problems. (JAP 353-54).

Todd and Kouri were also neighbors. He had a standing invitation to join the Kouri's for pizza every Friday night. (JAP 357-58). He had dinner with the Kouri's three or four times, had lunch with Mr. and Mrs. Kouri once, and lunch with Kouri during work hours approximately five to six times during the six month course of her employment. (JAP 263; 278; 357). They had drinks together at the Sheraton after work about three times (JAP 357), which was not unusual among employees. (JAP 336).

During January and February of 1988, Kouri was hospitalized at least twice for back problems. Todd visited her in the hospital a total of four or five times. (JAP 362). Todd always called first and normally came from his home. On one occasion he called from the hospital. Kouri always invited Todd up to visit with her and he normally did not stay long because of hospital rules and Kouri's condition. No one ever asked him to leave. (JAP 361-62). While Kouri was hospitalized, Todd brought her two gifts, a small crystal dog and a can of cookies. On Valentines Day he gave her a balloon and a sandwich. (JAP 636).

During secretaries week in late April 1988, Todd wrote various notes to Kouri thanking her for her assistance, some of which were intended to be humorous.

(JAP 449; 453-54; 455-56; 457-58; 488-89; 490; 651). On secretaries day Todd gave Kouri a written "Invitation with the boss:" the invitation contained a reference to an evening out at his expense with a notation "I picked a weekday so as not to interfere with your weekend - - however if you prefer we could do it Friday/Saturday evening as long as it is okay with John . . . if you accept, after we discuss, I will call John and ask his permission". (JAP 652-53). On April 25, 1988 Todd wrote Kouri a note wishing her a week filled with fun and joy. He thanked her for her continued loyalty and support and told her that he valued her advice and assistance in a very important job. He offered one night of babysitting whenever she chose "so that you and John may have an evening out". (JAP 467). None of the notes said that Todd was in love with Kouri, used the words "I love you," or contained any other lover-like references. (JAP 651-58; 449-91). In many of the notes Todd thanked Kouri for being his friend, and one note reflects Todd's ongoing work with his son, David, written in response to Kouri's inquiry. (JAP 453).

Deborah Pettit (hereinafter "Pettit") was secretary to Hollis Stephens. Pettit, Kouri, Stephens and Todd worked in the same office area. Initially, Kouri's desk was in an open area along a main hallway on the sixth floor. Later Kouri moved to an office between Todd and Stephens. After Kouri's move, she was directly across from Pettit's desk. (JAP 295-97). Kouri's office had a glass partition wall facing Pettit's desk and a glass wall between Kouri's and Stephens' office (JAP 297-98; 334). At no time during Kouri's employment did Pettit or Stephens observe unusual or inappropriate conduct by Todd toward Kouri.

(JAP 333-35; 297-98). Kouri never made any complaints or allegations that Todd had sexually harassed her or made her feel uncomfortable. (JAP 297-98; 333-35).

Todd never tried to kiss Kouri; never asked Kouri to have sex with him; and never asked Kouri to go to bed with him. (JAP 659; 371; 209-10). Todd never wrote or told Kouri that he loved her. (JAP 215; 371; 209-10). Todd never promised an increase in salary, a promotion or job benefits if she would have sex with him, and never threatened her with any adverse consequences if she would not have sex with him. (JAP 434; 384-92).

On May 6, 1988 Kouri telephoned Todd's supervisor, F. T. Lininger. He was not in so she was transferred to James McGuire, a Vice President of Liberian Services, Inc. Kouri told McGuire that she could no longer tolerate working for Todd and could not tolerate the constant tension of being his secretary. (JAP 315-16). She was at home very emotional, crying and upset. McGuire advised Kouri to stay home, compose herself over the weekend, and when she came in on Monday he would take her directly to Mr. Lininger. (JAP 315-16). McGuire thought Kouri was upset with Todd for working her too hard (JAP 316). Kouri never told McGuire that Todd was sexually harassing her or making unwanted advances (JAP 315-16).

Later the same afternoon, McGuire was told that both Mr. and Mrs. Kouri were in the office meeting with Todd. Shortly thereafter a very composed and calm Kouri appeared in McGuire's office, told him to forget everything, and that the matter with Todd had been resolved. (JAP 316-17). Nevertheless, on Monday McGuire met

with Lininger and informed him of his conversation with Kouri, including her appearance in his doorway and request that he forget everything. (JAP 317). Lininger met with Todd to discuss the matter and was assured that everything had been resolved. (JAP 305). It was Lininger's impression that Todd and Kouri had an argument or run in of some sort over the job. He was never told of any complaints of sexual harassment or unwanted advances.

On May 6, 1988 Kouri met with Todd in his office. She told him that they would have to stop having lunch together, that people were beginning to talk, and there were a lot of rumors going around the company. Todd told her that he appreciated her honesty and she went back to work. After that conversation they continued working together in a more professional manner and nothing unusual happened until the date of her resignation. (JAP 383-84).

The general work atmosphere was professional with most employees on a first name basis, congenial with one another, and an open door policy to the chairman for employee complaints. Any employee could talk to Lininger or McGuire about a complaint. (JAP 432-33; 304; 381; 336-37). Furthermore, the personnel committee composed of employees in various divisions of the company, was still in existence for receiving employee complaints. (JAP 303; 432-33). The more formal procedure for complaint as set forth in the company's policies was to first report directly to the supervisor, or, if that was impractical, to a member of the personnel committee. The committee members were named in Kouri's copy of the company policies. (JAP 543). Kouri never reported any

claims of sexual harassment or unwanted advances to Lininger, although she was aware of the open door policy as evidenced by her call to him on May 6, 1988. (JAP 433; 152).

Liberian Services' employment policies provided that new employees received employment evaluations and any recommendations for raises and/or promotions at six months from the beginning of their employment, and annually thereafter (JAP 360-61; 306-07; 343). A six month review did not automatically provide for increase in pay or promotion in grade or title and all raises or promotions had to be personally approved by the Chairman, F. T. Lininger. (JAP 361; 306-07; 386).

In early June 1988 Todd prepared a six month evaluation on Kouri for submission to Lininger for approval. (JAP 385-86). During the course of Todd's discussion with Kouri regarding her long range employment goals and his evaluations of her performance up to that point, Todd showed her the evaluation without salary recommendations and told her he intended to submit it to Lininger. (JAP 384; 386). Todd also discussed the areas in which Kouri needed improvement. Todd told her the importance of preserving the confidentiality of the personnel department by carefully monitoring information Kouri discussed with other employees, including Greg Lee, who was employed in the accounting department and had access to payroll information. (JAP 387-89). Todd never threatened to withhold submission of the evaluation and in fact did submit it along with certain salary recommendations to Lininger. (JAP 392). Nothing Kouri said during the course of that discussion influenced the recommendation prepared by Todd. (JAP 392). Lininger did not act upon Todd's recommendation because he had his own

reservations about Kouri's productivity and reliability as an employee. (JAP 302-03; 307).

Kouri resigned from Liberian Services on June 9, 1988. Later she filed a written complaint against Liberian Services and James Todd. Frank Wiswall, a Vice President, conducted an investigation into Kouri's allegations. This in-depth investigation lasted several weeks and included interviews with past and present personnel, as well as discussions with Todd and Mr. and Mrs. Kouri. (JAP 26-28; 32; 40-42). Wiswall discovered that there were no previous complaints of sexual discrimination or harassment against the company; that there was no evidence of any sexual harassment by Todd against Kouri or any other employee; and no evidence of physical advances of any kind. (JAP 40-41). He did discover that Kouri and Todd had developed a close friendship which arose out of their experiences with their children's drug problems. (JAP 32-33). Wiswall also discovered that Todd's recommendation and evaluation of Kouri's job performance was inappropriate and contrary to what Wiswall's investigation revealed about Kouri's ability and performance. (JAP 30-31; 34). Based on these findings, Wiswall recommended that Todd be reassigned. (JAP 30-31; 33-34).

Wiswall also recommended a more active personnel committee. Although still in effect during Kouri's employment, it was not as active as it had been in the past. An employee in any division with a personnel matter could go to someone within their division who is a member of the personnel committee, rather than limiting their contact to a central head. This system provided better communication of problems within the company

and a greater awareness of personnel problems. (JAP 35-39). A reorganization of the personnel department resulted in Hollis Stephens replacing Todd as Director and Chairman of the Personnel Committee. Deborah Pettit was Steven's secretary and under took most of Kouri's former duties. Part of Kouri's duties were reassigned to another department. (JAP 38-40; 309; 340-41).

On July 25, 1988, Wiswall offered Kouri reinstatement with Liberian Services as secretary to the Marine Investigations Division. The Chief of that division, Captain Chadwick, had a substantial secretarial and support staff need. (JAP 42-48; 327-28). The position involved legal work, significant contact with the public and governmental representatives, editing, typing, proofreading of special maritime reports concerning shipping disasters which are published throughout the maritime community. Chadwick had greater seniority than Todd and the position offered to Kouri had significant potential for advancement in title and salary. (JAP 342-43; 311-13; 43-45). The Marine Investigation's position was located two floors above Todd's new office and would have involved no interaction with Todd. (JAP 39-50).

Liberian Services also offered Kouri back pay retroactive to the date of her resignation, and an evaluation with Chadwick after one full month of employment in the Investigations position. Any recommendation Chadwick made for a salary increase would be retroactive to her original six month review date in June 1988. (JAP 45-46). Kouri requested that the offer be put in writing and this was done in a letter dated August 1, 1988. (JAP 50-51; 497-98). Kouri rejected the offer by letter dated August 8, 1988. (JAP 495-96).

Thereafter, Kouri worked sporadically for other companies until December of 1988 when she voluntarily quit her position and since that time was unemployed. (JAP 226; 291; 292-94; 192; 600-02; 609). She became pregnant and had a child in 1989, and after August of 1989 Kouri made absolutely no effort to secure additional employment. (JAP 660-61).

ARGUMENT

REASONS FOR DENYING THE WRIT.

I. There is no conflict among the Circuit Courts and the decision below was correct.

A. The Court of Appeals for the Fourth Circuit correctly affirmed the District Court's ruling that Petitioner failed to prove *quid pro quo* sexual harassment.

Two forms of sexual harassment are unlawful under Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.* One is the claim of hostile environment, in which the party must show: (1) that the conduct in question was unwelcome; (2) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (3) that the employer had actual or constructive knowledge of the sexually hostile working environment and took no prompt or remedial action. *Spencer v. General Electric Co.*, 697 F. Supp 204, 217, *rev.'d in part* 894 F.2d 651 (4th Cir. 1990); *Swentek v. USAir*, 830 F.2d 552, 557 (4th Cir. 1987); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989). The other is known as *quid*

pro quo sexual harassment, in which a supervisor demands sexual consideration in exchange for job benefits. *Spencer v. General Electric Co.*, 894 F.2d at 658; *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983); *Meritor Savings Bank v. Vinson*, 477 U.S. at 65.

In order for a plaintiff to establish a prima facie case of *quid pro quo* sexual harassment, she must prove the following:

(1) the employee belongs to a protected group;

(2) the employee was subject to unwelcome sexual harassment;

(3) the harassment complained of was based on sex;

(4) the employee's reaction to harassment complained of affected tangible aspects of the employees compensation, terms, conditions, or privileges of employment.

Spencer v. General Electric Co., 697 F.Supp. at 217.

The trial court made a factual finding that Todd's attention was not unwelcome (JAP 430); and that Todd never made any express or implied requests for sex or never demanded sex from Kouri in exchange for a recommendation for promotion (JAP 434). The court also found Kouri "entirely lacking in credibility on this issue, and it refused to buy into her theory of Todd's intentions." These factual findings are based on the trial court's determination that Kouri's testimony was not credible.

The standard of review in a Title VII action is set forth under F.R.C.P. 52(a), "findings of fact . . . shall not be set aside unless clearly erroneous and due regard shall

be given to the opportunity of the trial court to judge the credibility of the witnesses." This is true even if the court resolves the ultimate issue as to whether or not there was sexual harassment or discrimination. *Dwyer v. Smith*, 867 F.2d 186, 187 (4th Cir. 1989).

The trial court's factual findings may be overturned on appeal *only* if they are clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Rule 52(a) emphasizes that special deference should be given to credibility determinations made by the trial court: factual findings which are based on determinations regarding the credibility of witnesses should be afforded great weight, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief of what is said." *Id.* When the trial court's findings are based on the judge's decision to credit the testimony of two or more witnesses, each of whom has told fairly plausible stories that are not contradicted by extrinsic evidence, that finding, if not internally inconsistent, **can virtually never be clear error**. *Id.* (Emphasis added)

Kouri's Petition for a Writ of Certiorari suggests that the Fourth Circuit made a finding that there must be an express request for sexual favors in order to establish a prima facie case of sexual harassment, and that finding is in opposition to the opinions of other circuits which require that the conduct of the alleged harasser merely be sexual in nature when considered in the totality of the circumstances. Kouri's argument on this issue highlights a difference without a distinction. The District Court and the Fourth Circuit Court of Appeals did *not* find that an explicit request for sexual favor was a prerequisite for the

plaintiff to establish a prima facie case. In fact the trial court found that in Kouri's case, no express ***or implied*** requests for sexual favors were made by Todd. The Fourth Circuit's definition of sexual harassment is substantially the same as the definition used by other federal circuits. *See Jones v. Flagship International*, 793 F.2d 714, 721-22 (5th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982).

Assuming, arguendo, that there was a conflict between the circuits on the nature and extent of conduct necessary to support a sexual harassment claim, Kouri's case does not present a factual scenario upon which to resolve any alleged conflict because the trial court found that Kouri failed to prove another independent element of her prima facie case on harassment, that Todd's advances were unwelcome. (JAP 434).

B. The Court of Appeals for the Fourth Circuit correctly affirmed the District Court's ruling that there was no basis for imposing liability on Respondent Liberian Services, Inc.

To prove a claim against an employer under Title VII, it must be shown that the conduct in question was unwelcome, that the harassment was based on sex, that the harassment was sufficiently severe or pervasive to create an abusive working environment and some basis for imposing liability on the employer. Civil Rights Act of 1964 Section 701 *et seq.*, 42 U.S.C. Section 2000e *et seq.* An employer is held liable where it had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action. *Swentek v. USAir, Inc.*, 830 F.2d at 558. In

establishing the employer's knowledge, the plaintiff may demonstrate that the complaints about the harassment were lodged with the employer or that the harassment was so pervasive that the employer is deemed to be aware of its existence. *Katz v. Dole*, 709 F.2d at 255.

Kouri failed to prove Liberian Services' liability. The trial court analyzed the testimony and evidence presented by all parties and made a factual determination that Kouri failed to prove that she was sexually harassed by Todd. Specifically, the trial court found that Todd's conduct was not unwelcome. The question of whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determination of the trier of fact. *Meritor Savings Bank v. Vinson*, 477 U.S. at 68. The court's findings are not against the clear weight of the evidence and, absent a showing that they are clearly erroneous, should be upheld on appeal.

The issue of employee liability arises only after the court determines that Kouri was the victim of harassment. Kouri had the burden of proving that Todd's conduct was sufficiently severe or pervasive to create an abusive working environment. *Katz v. Dole*, 709 F.2d at 256. In assessing the work environment, the court must evaluate the totality of the circumstances surrounding the alleged conduct. *Spencer v. General Electric Co.*, 697 F. Supp. at 218 *citing Highlander v. KFC National Management Co.*, 805 F.2d 644 (6th Cir 1986). To determine whether the harassment was sufficiently severe or pervasive the trial court must examine the evidence *both* from an objective perspective and from that of the alleged victim. *Paroline v. Unisys Corp.*, 979 F.2d at 105. The trial court found that

Todd's conduct did not have the effect of "unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously [her] psychological well being." (JAP 431). The trial court also made the factual finding that Todd's conduct would not have interfered with a reasonable person's work performance or created an intimidating, hostile, or offensive working environment that would have seriously affected a reasonable person's psychological well being. (JAP 432).

If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, an Appellate court may not reverse even though convinced that, had it been sitting as the trier of fact, it would have decided the case differently. Where there are two permissible views of the evidence, the trial court's choice between them is not clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. at 574.

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Miller v. Mercy Hospital, Inc.*, 720 F.2d 356, 361 (4th Cir. 1983); *Anderson v. Bessemer City*, 470 U.S. at 574. It is not the function of the appellate court to duplicate the work of the lower court and it is not to decide the factual issues *de novo*. This is true even when the trial court's findings do not rest on the credibility determinations but, instead, on physical or documentary evidence or inferences from other facts. *Anderson v. Bessemer City*, 470 U.S. at 574.

No other employees observed anything unusual between Kouri and Todd; they never heard of anything unusual between Kouri and Todd; and Kouri never complained to her co-workers about Todd. (JAP 296-299; 317; 333-35). The trial court relied on the testimony of Kouri's co-workers when concluding that other Liberian Services' employees were unaware of Todd's alleged conduct (JAP 433). The trial court's findings that the employer was unaware of a sexually hostile working environment was amply supported by the evidence and testimony presented at trial.

When Liberian Services was notified of a problem it took prompt and appropriate remedial action. James McGuire's testimony of the events which occurred in May of 1989 was found by the court to be more credible than Kouri's. Thus, the court's actual findings concerning the extent of Liberian Services' knowledge of Kouri's complaints and the nature of the working environment were not clearly erroneous.

After Kouri resigned her employment with Liberian Services, and filed an action alleging sexual harassment, the company performed an in-depth investigation into Kouri's allegations to evaluate the work place environment. As a result of this investigation, Liberian Services found no evidence of sexual harassment or sexual discrimination (JAP 40-41). An employer may be held liable if it ignores allegations of sexual misconduct or if it fails to take remedial action reasonably calculated to end the harassment. *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir 1991) *citing Katz v. Dole*, 709 F.2d at 256. In the case at bar, when Liberian Services was notified of a problem it took

immediate steps to evaluate, investigate and appropriately remedy the situation.

Kouri's argument that Todd's conduct is sufficient as a matter of law to impose liability on Liberian Services is contrary to any previous decisions decided by this court, and advocates a strict liability imposition on the employer in a sexual harassment hostile environment case. In *Meritor Savings Bank vs. Vinson, supra,* this court stated that the trial court should look to agency principles for guidance in the area of imposition of liability on an employer for the alleged discriminatory acts of a supervisor/employee. *Meritor Savings Bank v. Vinson,* 477 U.S. at 72. The determination of an employer's liability for the alleged discriminatory conduct by the supervisor is a question of fact. *Paroline v. Unisys Corp.,* 879 F.2d at 106. The District Court's credibility determinations in this case should be given due deference under Rule 52(a), and the testimony presented at trial shows that the court's findings in that regard were not clearly erroneous. *See Dwyer v. Smith,* 867 F.2d at 190.

Applying agency principles in this case, an employer will only be liable for the tortious acts of an employee where "the employee was performing his employer's business and acting within the scope of his employment." *Kinsington Assoc. v. West,* 234 Va. 430, 432, 362 S.E.2d 900 (1987). "Generally an act is within the scope of the employment if, 1. It was expressly or impliedly directed by the employer, or is naturally incident to the business and, 2. It was performed, although mistakenly or ill-advisably, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employers business,

and did not arise wholly from some external, independent and personal motive on the part of the employee to do the act upon its own account. *Id.* Whether the employee was acting within the scope of this employment is ordinarily a question for the trier of fact. *Id.*

The evidence presented at trial showed that Todd's conduct toward Kouri was neither expressly nor impliedly directed by Liberian Services. The District Court's factual findings included the specific finding that neither management nor any of the other employees, including those working close to Kouri and Todd, were aware of anything unusual between the two. (JAP 427, 433). Todd's alleged conduct was clearly not a natural incident of Liberian Services business, and many of the alleged activities occurred after business hours or were purely social. (JAP 420-23).

The District Court's factual finding that Todd's job, even though classified as personnel director, was not characterized by the wide latitude or discretion characteristic of an agent who could bind or speak for the corporation, was not clearly erroneous. The District Court specifically found that Todd's position was of insufficient authority to impute his actions to Liberian Services. (JAP 433). Accordingly, based on the District Court's findings of fact, the clear evidence that none of Todd's alleged actions could be classified as falling within the scope of his employment or furthering the employers business, the Fourth Circuit Court of Appeals correctly found that Liberian Services was not liable for Todd's conduct.

C. Petitioner has no cause of action for retaliation.

As a threshold matter, retaliation was never alleged in the pleadings filed by Kouri with the Eastern District of Virginia. A reviewing court will generally not pass on a non-jurisdictional question which has not been decided on by the trial court in the first instance. In the case at bar, the Eastern District of Virginia did not have the issue of retaliation properly before it for review. Hence, the opinion of the trial court does not address this issue. Likewise the Fourth Circuit Court of Appeals did not address the issue of retaliation.

Kouri resigned her position with Liberian Services on June 9, 1988. On July 25, 1988 Liberian Services offered Kouri reinstatement as secretary to the Marine Investigation Division with backpay retroactive to the date of her resignation. Kouri's performance in this new position would have been evaluated by her new supervisor, Captain Chadwick, after she had performed in the new position for the period of one month. Any action taken on that review would be retroactive to the date of her original six-month evaluation. Wiswall's letter went on to state "It would, we feel, be entirely inappropriate in view of the charges you have made for the Company to rely upon the evaluation prepared by Mr. Todd." (JAP 498).

Liberian Services' discounting of Todd's evaluation shows that the company was taking Kouri's allegations seriously. It is entirely reasonable for the company to give little credibility to an evaluation prepared by Todd who, if Kouri were to be believed, was interested in advancing her in exchange for sexual favors not based on her performance and abilities.

The trial court was not persuaded that there was evidence to support Kouri's argument that Liberian's reevaluation of Kouri's performance was an act of retaliation taken by Liberian Services, Inc. Furthermore, the trial court's factual finding that Kouri was given a valid offer of reinstatement refutes her claim of retaliation. Finally, Kouri's half-hearted attempts at any subsequent employment and a complete failure to mitigate her damages also refute her claims.

Throughout her Petition, Kouri makes numerous assertions of fact which in reality were not admitted as fact at trial. Much, if not all, of her evidence was substantially contradicted by other evidence presented on behalf of Liberian Services, or in some places, her own evidence. A reversal of the lower court's findings in this case will involve a detailed inquisition into all of the evidence presented at trial, and a reexamination of the credibility determinations made by the trial judge. Such is not the purpose for granting of a Writ. The standard of applicable review is as set forth under F.R.C. Rule 52(a), and no useful purpose would be served by revisiting the issues lawfully tried in this case.

CONCLUSION

For the foregoing reasons, the court should deny Kouri's Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED
LIBERIAN SERVICES, INC.

By Counsel

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APPENDIX

USLICO CORPORATION
SCHEDULE OF OWNERSHIP
June 30, 1992

Company	% Owned	Jurisdiction	Nature of Business
USLICO CORPORATION	Parent	Virginia	
-United Services Life Insurance Company	100.0000	Virginia	Life Insurance Company
--Bankers Security Life Insurance Society	100.0000	New York	Life Insurance Company
--Provident Life Insurance Company	100.0000	North Dakota	Life Insurance Company
--United Olympic Life Insurance Company	100.0000	Washington	Life Insurance Company
---USLICO Corporation (300,000 shares)	----	Virginia	Parent Company
----Delaware Administrators, Inc.	100.0000	Ohio	TPA – Health
-USLICO Securities Corporation	100.0000	Delaware	Broker Dealer
-Bankers Centennial Management Corp.	100.0000	Delaware	Investment Advisor
-IB Holdings, Inc.	100.0000	Virginia	Holding Company
--USLICO Corporation (3,371,835 shares)	----	Virginia	Parent Company
--Northeastern Insurance Company of Hartford	100.0000	Connecticut	Reinsurance Company
--The New Providence Insurance Company, Limited	100.0000	Cayman Is.	Insurance Company
IB Resolution, Inc.	100.0000	Virginia	Service Company
---Washington International Limited	100.0000	Hong Kong	In Liquidation
--International Risks, Inc.	100.0000	Delaware	Insurance Agency
--The International Trust Company of Liberia (1)	82.8684	Liberia	Bank & Adm. Mar. Code
---Intrusco Corporation	100.0000	Liberia	Inactive
---80 Broad Street, Limited	100.0000	Liberia	Inactive
---Insurance Company of Africa	78.0968	Liberia	Insurance Company
----The Liberian Bank for Development and Investment (2)	3.9060	Liberia	Banking
---The Liberian Bank for Development and Investment (2)	5.6640	Liberia	Banking
--Registry Holdings, Inc.	100.0000	Virginia	Holding Company
---Corporate Services Company Limited	66.6667	Nevis	In Liquidation
---International Registries, Inc.	100.0000	Virginia	Service Company
----Liberian Services, Inc.	100.0000	New York	Rep. Serv. – USA
-----Liberian Services, Limited	100.0000	England	Rep. Serv. & Ship. Insp
-----Stichling International Registries	100.0000	Holland	Ship Inspection
-----International Registries (Far East) Limited	100.0000	Hong Kong	Rep. Serv.
-----Liberian Services (Greece) Limited	100.0000	Greece	Ship Inspection
----Marshall Islands Maritime & Corporate Administrators, Inc.	100.0000	Virginia	Rep. Serv.

Company	% Owned	Jurisdiction	Nature of Business
---American Security Management Corporation, Ltd.	100.0000	Marshall Isl.	Holding Company
----Administrative Control Services, Inc.	100.0000	Virginia	Service Company
----American Insurance Management, Inc.	100.0000	Liberia	Insurance Agency
----Atlantic Data Corporation	90.7534	Liberia	Data Processing
----Corporation Services, A.G.	100.0000	Switzerland	Rep. Serv.
----Export Purchasing Corporation	100.0000	New York	Purchasing Agent
----ICD Corporate Managers Limited	50.0000	Ireland	Corporate Mgmt. Service
-----ICD Corporate Services Limited	100.0000	Liberia	Service Company
-----ICD Corporate Directors Limited	100.0000	Liberia	Service Company
-----ICD Nominees Limited	100.0000	Liberia	Service Company
----Second ICD Nominees Limited	100.0000	Liberia	Service Company
----International Registries (Greece) Ltd.	100.0000	Greece	Rep. Serv.
----International Registries (U.K.) Limited	100.0000	England	Rep. Serv.
----International General Services, S.A.	100.0000	Luxembourg	In Liquidation to 1993
----International Registries, S.A.	100.0000	Marshall Isl.	Service Company
----Liberian Corporation Services, Inc.	100.0000	Delaware	Rep. Serv. – No. Amer.
----Liberian Services, S.A.	100.0000	Liberia	Rep. Serv. – Europe
----Provident Agencies, Ltd.	100,0000	Marshall Isl.	Insurance Agency
----Reston Maritime, S.A.	100.0000	Panama	Finance Company
---First United Corporate Services, Inc.	100.0000	Panama	Corporate Administration
---First United Maritime Services, Inc.	100.0000	Panama	Maritime Administration
---International General Subsidiaries, Inc.	100.0000	Delaware	Leasing and Contracting
---The Trust Company of the Marshall Islands, Inc.	100.0000	Marshall Isl.	Adm. Mar. & Corp. Code
----Majuro Nominees Ltd.	100.0000	Marshall Isl.	Service Company
---Marshall Islands Maritime Administrators, Inc.	80.0000	BVI	Service Company
-The International Trust Company of Liberia (1)	12.4272	Liberia	Bank & Adm. Mar. Code

(1) IB Holdings, Inc. owns 82.8684%. USLICO owns 12.4272%.

(2) The International Trust Company of Liberia owns 5.664%. The Insurance Company of Africa owns 3.9060%.